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No. 94-64

In the Supreme Court of the United States

OCTOBER TERM, 1994

CHESAPEAKE BAY FOUNDATION, INC., PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
JENNIFER HAY ZACKS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals erred in requiring the district court to consider whether the government's objection to the disclosure of materials requested under the Freedom of Information Act, 5 U.S.C. 552(a)(4)(E), was legally correct before awarding attorney's fees under that Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 11 F.3d 211. The opinion of the district court (Pet. App. 12a-17a) is reported at 785 F. Supp. 1030.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1993. A petition for rehearing was denied on March 11, 1994. Pet. App. 18a. On May 26, 1994, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including July 9, 1994. The petition was filed on July 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In May 1988, petitioner wrote to the Department of Agriculture (USDA) requesting unpublished data that had been provided to USDA in connection with a 1985 survey of Maryland pesticide use. Noting that the data had been collected from public agencies pursuant to pledges of confidentiality, USDA declined to provide the information, except in summarized form, without waivers by those agencies of any objections to release. C.A. App. 8. However, USDA offered to seek such waivers from the providing agencies and to absorb the administrative costs of doing so, if petitioner would pay the postage.

Petitioner instead filed a formal request for the data under the Freedom of Information Act (FOIA), 5 U.S.C. 552(a)(4)(E). USDA denied this request, relying on FOIA exemption 3 (5 U.S.C. 552(b)(3)), which exempts from FOIA's disclosure requirements information the release of which is prohibited by another statute.[1] Here, USDA explained, disclosure was prohibited by the confidentiality guarantees contained in 7 U.S.C. 2276, which bars the disclosure to the public of information furnished pursuant to the Department of Agriculture's authority to procure information concerning agricultural statistics, except in a form that "does not allow the identification of the person who supplied particular infor-

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[1] 5 U.S.C. 552(b)(3) provides in relevant part that FOIA is inapplicable to matters that are

> specifically exempted from disclosure by statute * * * provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

mation." Violation of those confidentiality guarantees renders the discloser liable to criminal penalties.[2] USDA renewed its offer to request waivers from the agencies that had supplied the information and to pay the administrative costs related to contacting the agencies, except for the postal costs.

Petitioner did not respond to either of USDA's offers to seek waivers, and instead administratively appealed the denial of the FOIA request, arguing that public agencies are not covered by the confidentiality guarantees of 7 U.S.C. 2276. USDA denied petitioner's administrative appeal, concluding that the records sought by petitioner are specifically exempted from disclosure by the confidentiality guarantees of 7 U.S.C. 2276. Petitioner then brought this action against USDA to compel the agency to release the pesticide data.

At a status call, Judge Sporkin urged the parties to seek waivers from the state agencies to avoid a trial on the merits. Judge Sporkin also issued an order directing the public agencies and the Attorney General of Maryland to file any objections to the release of the survey information, and to state their objections at a scheduled hearing.[3] In response to those actions, USDA wrote the interested agencies, inviting them to execute an enclosed authorization for release of the information. The agencies that had submitted the pesticide data

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[2] The statute does not expressly provide for waivers, but the confidentiality provisions appear to have been designed solely to protect the submitter of the data. Presumably, therefore, if the submitter waives that protection, the criminal penalties for disclosure do not apply.

[3] As the court of appeals noted, "the trial judge never explained the basis for his 'orders' to state agencies that were not parties to the lawsuit." Pet. App. 3a.

waived their confidentiality interests, and petitioner received the information it sought.[4]

Petitioner then applied for attorney's fees and costs under FOIA, 5 U.S.C. 552(a)(4)(E), and was awarded $44,373.07. Judge Sporkin applied the established two-part analysis for fee awards under FOIA: he first considered whether petitioner was "eligible" for an award, that is, whether the suit caused the release of the information; second, he considered whether petitioner was "entitled" to an award, that is, whether a fee award would serve the underlying purposes of FOIA. Judge Sporkin concluded that petitioner was eligible for fees because its suit "was necessary and resulted in it obtaining substantially all the information it requested." Pet. App. 15a. He then found that petitioner was entitled to an award because "[t]he entire public benefits when it has information regarding the use or nonuse of potentially harmful chemicals," and because petitioner had no commercial interest, but was merely investigating possible public exposure "to unsafe or unhealthy chemical use." *Id.* at 16a-17a. Judge Sporkin did not discuss whether USDA's basis for withholding the data was reasonable.

The court of appeals reversed and remanded. Pet. App. 1a-11a. Although the court of appeals acknowledged that the "solution implemented by the trial court * * * was nothing more than what had been proposed by USDA

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[4] Although two agencies did not waive their confidentiality rights, petitioner nonetheless received information from them. The Wicomico County Department of Parks and Recreation released the survey data directly to petitioner's counsel. Information collected from the Maryland Department of Education was released to petitioner despite the agency's lack of consent because it contained only aggregate data that would not disclose the identities of the submitters.

representatives long before litigation was commenced," the court of appeals nonetheless agreed with the district court that the "lawsuit did in fact cause the release of the data." *Id.* at 8a, 11a. However, the court of appeals concluded that the district court's award of fees "cannot stand" because the district court had "completely failed to consider" whether the government's basis for withholding the information was reasonable. *Id.* at 9a. It therefore directed the district court, on remand, to apply the four-factor test (under the "entitlement" prong of the two-part analysis) followed by the court of appeals for determining whether attorney's fees should be awarded under FOIA,[5] and to weigh the reasonableness of the government's position "along with other considerations in the entitlement calculus." *Id.* at 10a. If the district court determined that the balance of factors weighed in favor of an award of fees, the court of appeals instructed the district court to consider the merits of the government's legal basis for withholding the requested documents. If they were in fact exempt from disclosure under FOIA, the court of appeals concluded that "no fees are recoverable." *Ibid.*[6]

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[5] That test requires consideration of (1) the benefit of the release to the public; (2) the commercial benefit of the release to the plaintiff; (3) the nature of the plaintiff's interest in the records; and (4) whether the government's withholding had a reasonable basis in law. Pet. App. 9a.

[6] The court of appeals noted that "it is clear that USDA's basis for withholding the survey data was reasonable," and that the government's reading of the governing statutes to bar the release of information in the absence of waivers was "likely correct." Pet. App. 10a, 11a.

ARGUMENT

The Freedom of Information Act allows recovery of attorney's fees when the requester has "substantially prevailed." 5 U.S.C. 552(a)(4)(E). To determine whether to award fees in a particular case, courts typically conduct a two-part analysis. First, the court determines whether the party seeking fees is "eligible" for them, that is, whether the litigation was necessary and was a substantial cause of the release of the documents. The second part of the analysis—and the one at issue in this case—is a FOIA litigant's "entitlement" to attorney's fees. In determining entitlement, courts ordinarily consider at least four factors: (1) the benefit of the release to the public; (2) the commercial benefit of the release to the plaintiff; (3) the nature of the plaintiff's interest; and (4) whether the government's withholding had a reasonable basis in law. See, *e.g.*, *Tax Analysts* v. *Department of Justice*, 965 F.2d 1092, 1093 (D.C. Cir. 1992); see also S. Rep. No. 854, 93d Cong., 2d Sess. 19 (1974).

1. Petitioner contends that the decision below "has created an irreconcilable conflict in the circuits [because] * * * the other circuits require that, at a minimum, all four factors * * * be considered in assessing a FOIA fee application." Pet. 6. In fact, no such conflict exists, and the court of appeals' explanation of how the district court should approach the entitlement issue on remand is unexceptionable. Contrary to petitioner's contention (Pet. 9), the court of appeals' decision is not "at odds" with the decisions requiring that all four factors be considered. In fact, the court of appeals concluded that the district court's fee award "cannot stand" precisely because of the district court's failure to consider one of the factors—the reason-

ableness of the government's position. Pet. App. 9a. The court of appeals expressly directed the district court to consider all four factors, weighing "the reasonableness of the [government's] position * * * along with other considerations in the entitlement calculus." *Id.* at 10a.

However, it is clear that those four factors are not the exclusive determinants of whether FOIA fees should be awarded; additional factors may be considered. See S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 10 (1974) (explaining the omission of the four factors from the legislation on the ground that "a statement of the criteria may be too delimiting and is unnecessary"). The court of appeals determined that, in this case, if the four-factor test weighed in favor of the award of fees, an additional factor should be considered—whether the information released was subject to FOIA's disclosure provisions. This application of the principles of FOIA and its attorney's fee provision serves the statute's underlying aims in this case; it is in no way contrary to the decision of any other court.

In the typical FOIA fee litigation, FOIA fees are sought only after the government has lost a suit on the merits challenging its withholding of the requested information. The usual issue in fee litigation is thus whether the government's position, although incorrect, was reasonable. Here, the requested information was voluntarily released after the state agencies had waived their confidentiality guarantees, and the question whether the information would have been available under FOIA without such waivers was never litigated. As the court of appeals observed, the government's basis for withholding the requested data, in light of the statutory prohibition on its release, was "concededly reasonable" and was "likely correct." Pet. App. 10a, 11a. Under these circumstances, the court of appeals appropriately

directed the district court to consider an additional factor in the entitlement calculus—whether the government's position was legally correct because, absent waivers, the disclosure of the information was statutorily barred.

No court, to our knowledge, and certainly no decision cited by petitioner, awards fees under FOIA for obtaining documents excluded from FOIA's provisions. It would not further any conceivable purpose of FOIA to award attorney's fees for obtaining documents the disclosure of which was not authorized by FOIA. Indeed, such an award would undercut FOIA's aims. FOIA, while reflecting a general policy of agency disclosure, specifically exempts nine enumerated categories of documents from the disclosure requirements. Congress created those exemptions because it "realized that legitimate governmental and private interests could be harmed by the release of certain types of information." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982).[7] Awarding fees in cases like the instant one would penalize the government for developing creative solutions, as it did here, that both protect the statutory guarantees of confidentiality and allow voluntary disclosures of information.

2. Petitioner relies on the criteria for fee awards under a variety of other statutes. All are irrelevant. The civil rights fee statutes, such as 42 U.S.C. 1988 (Supp. IV 1992), establish a lower threshold for awarding attorney's fees. As the legislative history of FOIA's fee provision shows, the rule of a presumptive award of attorney's fees was not adopted for FOIA cases. See Pet.

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[7] Indeed, in this case, USDA withheld the documents because their release was affirmatively prohibited by another statute, 7 U.S.C. 2276.

7-8 (discussing legislative history). Instead, Congress expected the courts to apply criteria like those cited above to determine the circumstances in which a fee award should be made. The legislative history makes clear that those criteria were not expressly enumerated in FOIA itself because Congress believed that "the existing body of law on the award of [FOIA] attorney fees recognizes such factors," and "a statement of the criteria may be too delimiting and is unnecessary." S. Conf. Rep. No. 1200, *supra*, at 10. Moreover, as the Conference Report explained, "[b]y eliminating these criteria, the conferees did not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria." *Ibid.*

Similarly, the Equal Access to Justice Act, 28 U.S.C. 2412(d) (EAJA), also cited by petitioner, has no bearing on this case. As petitioner observes (Pet. 16-17), the determination of whether the government's position was substantially justified so as to preclude an award of EAJA fees does not generally involve a definitive determination of the merits of the case. But nothing in the language or legislative history of FOIA's fee provision precludes a court, when ruling on a fee application, from considering whether the information released was covered by FOIA, as the court of appeals required the district court to do here.

3. Finally, petitioner claims that the court of appeals' decision is contrary to considerations of judicial economy and would discourage settlement. Pet. 14. In fact, it is petitioner's own position, if adopted, that would greatly deter settlements and thus tend to promote needless litigation. If FOIA fee awards were routinely available once information is released, even if that information is not subject to FOIA, the government

would have a strong incentive not to turn over information voluntarily, since by doing so it would render itself liable to fee awards.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LEONARD SCHAITMAN
JENNIFER HAY ZACKS
Attorneys

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